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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

Petitioners,

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. McCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Counsel for Petitioners.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners, State of Oklahoma *ex rel.* Oklahoma Tax Commission, H. L. McCracken, Chairman, Raymond D. Thomas and E. L. Richardson, members of said Commis-

sion, and R. B. Connor as Sheriff of Osage County, Oklahoma, most respectfully pray this Honorable Court that a writ of certiorari be granted, to review the proceedings had, and final decision of the Supreme Court of the State of Oklahoma, in a certain case pending in said Court styled and numbered, Barnsdall Refineries, Incorporated, et al., v. Oklahoma Tax Commission, et al., defendants, No. 25181, wherein your petitioners were defendants, and respondents were plaintiffs, and respecting such proceedings and final decision, respectfully represent and show:

Proceedings in the Supreme Court of Oklahoma.

That on the 17th day of November, 1933, the respondents, residents of the State of Oklahoma, as plaintiffs, commenced an original action in the Supreme Court of the State of Oklahoma against your petitioners as defendants, for the purpose of enjoining the collection, as applied to the respondents, oil companies' interests in and to petroleum oil produced under leases held by said respondents on lands in the Osage Indian Nation, one-eighth of one cent per barrel tax on each and every barrel of petroleum oil produced therefrom, levied under the provisions of the Act of the Fourteenth Legislature of the State of Oklahoma, being c. 132, Oklahoma S. L. 1933, for the support and maintenance of the Oil and Gas Proration of Production Department of the State government; the material portions of which are hereinafter set forth.

Respondents are the owners of a large number of departmental oil and gas mining leases, approved by the Department of the Interior, in the Osage Indian Nation, from which leases they produce large quantities of petroleum oil. Respondents in said action, contend that they had a right to produce such oil from said departmental oil and gas mining leases, free from the tax imposed or attempted to be imposed by the Act above mentioned, on the ground that

the oil and gas in the Osage Nation was allotted; and belonged to the Osage Tribe of Indians, which is a dependent Indian tribe under the jurisdiction of the Department of the Interior, and that in producing such oil they were acting as federal agencies under the Act of June 28, 1906 (34 Stats. at L. 539), and particularly as provided by sec. 3 of said Act.

It was further contended by respondents that the tax levied under the above Act is an excise tax, and that the collection of such tax as applied to the lessees', oil companies' interests in and to oil produced from lands in the Osage Indian Nation, was not authorized by the Act of March 3, 1921 (41 Stats. at L. 1250), and that the Act of the Legislature of the State of Oklahoma, above referred to, is unconstitutional as applied to oil produced from lands in the Osage Indian Nation, in that it levies a tax on a governmental agency and deprives respondents of their property without due process of law.

Petitioners herein, in said action, contended that notwithstanding the tax levied under the Act in question is designated an excise tax, it in in fact a tax upon the production of petroleum oil, and the State was authorized to levy such tax on oil produced from lands in the Osage Nation, under the provisions of the Act of March 3, 1921 (41 Stats. at L. 1250).

Upon final hearing of said cause in the Supreme Court of Oklahoma, said Court granted the injunction, and in said cause, held (*Barnsdall Refineries, Inc., et al.*, v. *Oklahoma Tax Commission et al.*, 41 Pac. (2d) 918):

> "The excise tax of one-eighth of one cent per barrel on oil levied by chapter 132, Sess. Laws 1933, when applied to oil produced from lands of the Osage Indian Tribe in Osage County, Okl., by lessees operating under leases executed by and with the approval of the Secretary of the Interior of the United States, is an unauthorized state tax on a federal governmental agency or

instrumentality, and is beyond the authority of the state."

The Supreme Court of Oklahoma further held the levy of the tax unauthorized by the Act of Congress of March 3, 1921 (41 Stats. at L. 1250). Section 5 of the Act provides:

> "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper offices of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

That the opinion in the above cause was rendered on the 19th day of February, 1935; that your petitioners thereafter, and in due time, under the rules of the Supreme Court of the State of Oklahoma, filed their petition for rehearing in said cause, which said petition was denied on the 12th day of March, 1935, and your petitioners, therefore, aver that the judgment of the Supreme Court of the State of Oklahoma in said cause became final on the 12th day of March, 1935.

Your petitioners further state that there was drawn in question in said cause, the validity of a statute of the State of Oklahoma on the ground that, as applied to the facts in said cause, the tax thereby levied and attempted to be collected was a tax on a governmental agency or instrumentality and, therefore, in violation of the Act of Congress of June 28, 1906 (34 Stats. at L. 539), and repugnant to the Fourteenth Amendment to the Constitution of the United States, in that an attempt to tax respondents thereunder deprived them of their property without due process of law.

That the statute of the State of Oklahoma drawn in question in said cause, was c. 132, Oklahoma S. L. 1933, the material parts of which provide:

> "Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."
>
> "All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced

in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund." All moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created."

That the final decision of the Supreme Court of the State of Oklahoma was against the validity of said statute as applied to the lessees' interests in petroleum oil produced from lands in the Osage Indian Nation.

Your petitioners further allege that there was also drawn in question in said cause, the right of respondent Oklahoma Tax Commission, to levy and collect said tax upon the said lessees' interests in petroleum oil produced from lands in the Osage Indian Nation under the provisions of the Act of March 3, 1921 (41 Stats. at L. 1250), and that the final decision of the Supreme Court of the State of Oklahoma was against the right of the respondents to collect the tax thereunder.

Your petitioners believe and, therefore, assert, that the final decision of the Supreme Court of the State of Okla-

homa against the rights, privileges and immunities of your petitioners under the Constitution and statutes of the United States specially set up and claimed in said cause, is erroneous in the following particulars, to-wit:

Assignments of Error.

I.

The Supreme Court of the State of Oklahoma erred in holding that an excise tax of one-eighth of one cent per barrel on oil levied by c. 132, Oklahoma S. L. 1933, when applied to oil produced from the lands of the Osage Tribe in Osage County, Oklahoma, by lessees operating under leases executed by, and with the approval of the Secretary of the Interior of the United States, is an unauthorized tax on a federal governmental agency or instrumentality, and as beyond the authority of the State.

II.

The Supreme Court of the State of Oklahoma erred in holding that the tax levied by said c. 132, Oklahoma S. L. 1933, is an excise tax, and the levy thereof not authorized by the Act of March 3, 1921 (41 Stats. at L. 1250).

III.

The Supreme Court of the State of Oklahoma erred in granting the injunction.

Your petitioners aver that the decision of the Supreme Court of the State of Oklahoma, the highest court of said State, was in every instance against the rights, privileges and immunities set up by them in said cause.

Accompanying this application, and under the same cover, your petitioners present a brief showing more fully their views upon the question involved; also, exhibit as a part of this petition a full and complete transcript of the record in said cause, duly certified.

Your petitioners aver that they have no right to a review of the decision of the Supreme Court of the State of Oklahoma by this Honorable Court on appeal.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this Court directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of Oklahoma in this case, which is entitled in that Court: "In the Supreme Court of the State of Oklahoma, Barnsdall Refineries, Incorporated, et al., plaintiffs, vs. Oklahoma Tax Commission, et al., defendants, No. 25181." to the end that the said cause may be reviewed and determined by this Court as provided by law, and that your petitioners have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court.

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. MCCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA:

By C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. MCCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Their Attorneys.

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Respondents.

SUPPORTING BRIEF OF PETITIONERS.

The question involved in this proceeding is the right of the State of Oklahoma to collect one-eighth of one cent per barrel tax on petroleum oil levied under the Act of April

10, 1933, c. 132, Oklahoma S. L. 1933, page 301, as applied to the five-sixth working interest owned by the respondent, oil companies, lessees under departmental leases for the production of petroleum oil and gas held by them on Osage Indian lands. The tax is levied by sec. 1 of the Act, which provides:

> "Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."

The purpose for which the Act is levied is set forth in sec. 2 of the Act, which is as follows:

> "All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund". All

moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created."

Respondents are the owners of a large number of departmental oil and gas mining leases approved by the Department of the Interior, in the Osage Indian Nation, from which leases they produce large quantities of petroleum oil. Their action was based in the Supreme Court of the State of Oklahoma on the theory that they had a right to produce such oil from said departmental oil and gas leases, free from the tax imposed or intended to be imposed by the Act above mentioned, upon the ground that the oil and gas in the Osage Nation was allotted and belonged to the Osage tribe of Indians, which is an independent Indian tribe, under the jurisdiction of the Department of the Interior, and that in producing such oil they were acting as federal agencies under the Act of June 28, 1906 (34 Stats. at L. 539) as amended by the Act of March 3, 1921 (41 Stats. at L. 1249), and as further amended by the Act of March 2, 1929 (45 Stats. at L. 478), and that the State of

Oklahoma was without authority to levy a tax on lessee companies' interest in the petroleum oil so produced without the consent of Congress. It was further contended by respondents in said action that the Act of March 3, 1921 (41 Stats. at L. 1250) was insufficient to authorize the collection of the tax in question. Section 5 of this Act provides:

> "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

The Supreme Court of the State of Oklahoma sustained this contention, and enjoined the collection of the tax: *Barnsdall Refineries, Incorporated, et al,* v. *Oklahoma Tax Commission, et al.*, 41 Pac. (2d) 981.

We deem it unnecessary to set out in detail the Acts of Congress relied upon by respondents to sustain their contention that the leases held by them in this action, are governmental instrumentalities; but it may be stated that respondents rely upon the rule set out in the following:

Choctaw, Oklahoma & Gulf R. Co. v. *Harrison*, 235 U. S. 292;

Indian Territory Illuminating Oil Co., v. *Oklahoma*, 240 U. S. 522;

Gillespie v. *Oklahoma*, 257 U. S. 501;

Jaybird Mining Co. v. *Weir*, 271 U. S. 609;

Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

It is contended by petitioners that the tax in question is within the permissive grant of authority by Congress authorizing the levy and collection of taxes, upon production of oil and gas, from land in the Osage Indian Nation. Petitioners contend that Sec. 5 of the Act of March 3, 1921 (41 Stats. at L. 1250, *supra*), authorizes the State to levy and collect such tax.

The Supreme Court of the State of Oklahoma held the tax in question an excise tax, and the levy thereof, therefore, not authorized by the Act of March 3, 1931, *supra*. It is our contention that notwithstanding the tax in question is denominated an excise tax by the Legislature of the State of Oklahoma, it is in truth and in fact a tax upon the production of petroleum oil and, therefore, authorized by the Act of Congress above cited. It will be noticed the Act provides that the State of Oklahoma is authorized from and after the passage thereof, to levy and collect a gross production tax on all oil and gas produced in Osage County, Oklahoma. The amount of the tax authorized to be levied thereunder is not limited. The only limitation or qualification provided by the Act is that all taxes so collected "shall be paid and distributed, and shall be in lieu

of all other State and county taxes levied upon the production of oil or gas as provided by the laws of Oklahoma". If, therefore, the Act of the Oklahoma Legislature of 1933 be construed as we contend it should be, as levying an additional gross production tax upon the oil produced in the Osage Nation, such Act is clearly authorized by the provisions of the Act of Congress above cited. The fact that the Legislature in adopting the Act designed the tax in question as an excise tax is immaterial. The courts look to the intention and purpose of the Legislature in enacting the law levying the tax, and upon the practical effect and operation of said tax so imposed. In the case of *St. Louis Southern R. Co.* v. *State of Arkansas,* 234 U. S. 350, this Court said:

> "In determining the nature of a tax and constitutionality of the statute imposing it, this Court must regard substance rather than form and the controlling test is found in the effect as applied and enforced."

See also:

Shaffer v. *Carter, State Auditor,* 252 U. S. 257;
Mountain Timber Co. v. *Washington,* 243 U. S. 219;
Crew Levick Co. v. *Pennsylvania,* 240 U. S. 292;
American Mfg. Co. v. *St. Louis,* 250 U. S. 459.

The tax in question was levied for the purpose of raising funds to enforce the proration law enacted by the Legislature of the State of Oklahoma in 1933 (c. 131, Okla. S. L. 1933), which law was enacted to prevent waste, and protect the oil industry of the State. No ad valorem tax is levied against the property of the respondents, and the tax of one-eighth of one cent per barrel on each barrel of oil produced for the payment of expenses incident to the enforcement of the proration law, is the same kind and character of tax levied under sec. 2434, O. S. 1921 and is, therefore,

within the permissive Act of Congress (sec. 5, Act of March 3, 1921) (41 Stats. at L. 1250, *supra*).

The Supreme Court of Oklahoma in holding that the levying of the tax in question was not authorized by the Act of Congress herein relied upon, in the case of *Barnsdall Refineries, Inc., et al.* v. *Oklahoma Tax Commission, supra,* at Page 920, said:

> "Having concluded that this tax is an excise tax, and it not being contended that there is any specific consent to the levy and collection of an excise tax, we must determine whether this tax is consented to by the Act of Congress of March 3d, 1921, consenting to the levy and collection of a state gross production tax.
>
> Since the adoption of the legislative act of 1916, the 3 per centum tax thereunder levied and collected has been commonly known and referred to as the 'gross production tax.' That act provides specifically that the tax therein levied shall and should be 'in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases,' etc. O. S. 1931, sec. 12434. The act also provided that the funds collected should be distributed and expended for the three purposes heretofore stated. O. S. 1921, sec. 12445.
>
> This one-eighth of one cent tax is levied on each barrel of oil without regard to the value of the oil taxed. It is not a per centum tax as is the gross production tax. The money collected for gross production tax is distributed two-thirds for current expense of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or

required to be expended in the county where the oil is produced, but on the contrary, this money goes into the 'proration fund' and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration, and the different method of distribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in the language above quoted from the congressional act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters here under consideration, the duty, purpose, and policy of the United States government was to look after and provide for the general well-being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage county, Okla., by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage county. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this Act, however beneficial

to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians. The Congress might or might not consent to the levy and collection of this excise tax.

Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The state of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. *Burnet* v. *Coronada Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443, 76 L. Ed. 815."

It will thus be seen that the Supreme Court of Oklahoma based its conclusion on the theory that the tax under the Act in question was based on volume rather than on the value of the oil produced, and that it was to be distributed in a different manner than as provided by sec. 12445, O. S. 1931, the law then in existence levying a gross production tax upon petroleum oil produced in the State.

We contend that in so holding, the Supreme Court of Oklahoma erred. It will be observed that the permissive Act of Congress herein relied upon, does not limit the State in the manner in which the tax levied and collected on petroleum oil in the Osage Nation, shall be distributed, nor does it limit the amount of the tax the State is authorized to levy. The Act simply provides that all taxes so collected "shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of the State of Oklahoma," thus leaving it within the discretion of the State to distribute the tax so collected in such manner as the Legislature may direct. The challenged tax, therefore, in

our opinion comes clearly within the permissive Acts of Congress, and the injunction should have been denied by the Supreme Court of Oklahoma. In this conclusion we are sustained by the opinion of the United States District Court for the Northern District of Oklahoma, three judges presiding, in the case of *Gypsy Oil Co.* v. *Oklahoma Tax Commission,* 6 Fed. Supp. 6, Judge Kennamer dissenting. In that case in an opinion by Judge McDermott, after expressing some doubt as to whether the Court had jurisdiction, the Court said:

> "It may therefore be said that Judge Kennamer agrees with Judge Kennedy that there is no adequate remedy at law; and that the writer agrees with Judge Kennedy that whatever the character of the tax assailed—whether it is an excise tax or a property tax—it is a tax on gross production of oil within the permissive act of Congress."

Judge Kennedy in a concurring opinion, after expressing the opinion that the Court had jurisdiction, said:

> "Adverting to the merits, the claim is made by plaintiff that the tax in question is an excise tax and not a property tax, and therefore not within the permissive act of Congress quoted in the opinion of Judge McDermott. It will be noted that there is no specified limit to the gross production tax there permitted. It is immaterial in the practical construction of the act of Congress what the tax here may be called. In its nature it is the same type of tax which the state of Oklahoma has already levied on gross production upon the basis of value (admittedly valid as coming within the permissive act). Under the challenged law, attempt is made to levy a gross production tax upon the basis of volume. There is no distinguishable difference between the two. Both are within the scope of the permissive act, and I care not whether they may be denominated excise, gross production, or property taxes.

> In our interpretation and construction we should follow the principle aptly stated in *Shaffer* v. *Carter*, 252 U. S. 37, where the Supreme Court in speaking of state taxation laws, uses language at page 55, 40 S. Ct. 221, 226, 64 L. Ed. 445 as follows: 'This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.'
>
> I think the tax here challenged comes clearly within the permissive act, and I care not whether they may the bill should be dismissed upon the merits."

While the decree in that case was modified on appeal by this Court (*Gypsy Oil Co.* v. *Oklahoma Tax Commission*, 292 U. S. 611), ordering it modified so as to provide that the complaint be dismissed upon the ground that the district court was without jurisdiction because the requisite jurisdictional amount was not involved, we quote the language used by the judges in that case because of the reasoning involved and adopt such reasoning as a part of our argument in this case. We also refer to the dissenting opinion by Mr. Justice Osborne of the Supreme Court of Oklahoma, in the case of *Barnsdall Refineries, et al.* v. *Oklahoma Tax Commission* (41 Pac. 2d) at page 922, wherein the Justice said:

> "Two reasons are assigned in the majority opinion as to why the tax does not come within the permissive act of Congress. The first relates to the manner of levy in which it is pointed out that the gross production tax is based on the gross value of oil produced, while the tax involved herein is fixed at a flat rate per barrel of oil. I fail to perceive any manner in which this distinction relates to the practical operation and

effect of the tax imposed. The distinction is purely technical and is not justified by the manifest object and purpose of Congress in the enactment of the permissive statute.

"It is also pointed out in the majority opinion that the manner of distribution of the gross production tax differs from the manner of distribution of the tax involved herein. An examination of the permissive act of Congress discloses that the act does not directly or impliedly provide for the manner in which the tax levied by virtue thereof is to be distributed. On the other hand, the act specifically provides that the tax is to be distributed 'as provided by the laws of Oklahoma.' *It must have been contemplated that there was a possibility that the law providing for the distribution of the gross production tax might be changed or amended, and no one would contend that such a change or amendment would invalidate the permissive act of Congress and result in a withdrawal of said permission to levy and collect such tax.* In my judgment it is not within the province of Congress to provide for the manner of distribution or a general tax levy, as this is one of the powers vested in a sovereign state." (Emphasis ours.)

In our opinion the reasoning of Mr. Justice Osborne, in his dissenting opinion, is unanswerable, and such reasoning should be followed by this Court.

The Supreme Court of the United States in the case of *Storaasli* v. *State of Minnesota*, 283 U. S. 57, said:

"Federal court, while bound by State Court's decision construing state tax law, decides for itself character of state tax and its constitutionality."

At page 62, in the body of the opinion:

"This Court, while bound by the state court's decision as to the meaning and application of the law, *decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights.*" (Emphasis ours.)

An inferior federal court held the tax to be an additional gross production tax. The State Supreme Court held the tax to be an excise tax. Under the above rule, this Court is free to determine the character of the tax, notwithstanding the state court's decision, and particularly is this true in the above case because of the fact that the statute is construed in the light of an Act of Congress which has been construed by a federal court to embrace the one-eighth of one cent tax as an additional gross production tax.

We are herewith attaching as an appendix to this brief, such statutes and portions thereof as we deem material to the issues herein involved.

We respectfully submit that the Supreme Court of the State of Oklahoma erred in holding the Act in question invalid, and that this Court should, therefore, grant the writ of certiorari.

Respectfully submitted,

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR, AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

By C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. McCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Their Attorneys.

APPENDIX TO BRIEF.

Chapter 132, Oklahoma Session Laws 1933.

Petroleum—Excise Tax—Rate of Levy.

Section 1. Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this Act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid.

Proration Fund—Use of Money Constituting.

Section 2. All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund." All moneys in said fund are hereby appropriated, and shall be used for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy

umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created.

Tax—When Due—Delinquent—Lien on Property.

Section 3. The tax provided for in Section 1 hereof shall become due on the first day of each calendar month on all petroleum oil produced in the State of Oklahoma during the preceding monthly period, and if the tax is not paid on or before the end of such month the same becomes due, such tax shall become delinquent and from such time shall, as a penalty for such delinquency, bear interest at the rate of eighteen per centum per annum. When any tax provided for in this Act shall become delinquent, as above provided, the Oklahoma Tax Commission shall issue its warrant directed to the sheriff of any county for the collection of the amount of said tax, interest, and penalty, and the sheriff to whom said warrant shall be directed shall proceed to levy upon the property, assets, and effects of the person, firm, association, or corporation purchasing or producing petroleum oil required hereby to pay the tax so assessed, and to sell the same and to make return thereof as upon execution. Such tax, interest, and penalty shall constitute and remain a lien upon the property, assets, and effects of such person, firm, association, or corporation, purchasing or producing petroleum oil and hereby required to pay said tax until the same is paid, and may be recovered at suit of the State in any court of competent juris-

diction wherein any such person, firm, association, or corporation may own or have property, assets, and effects therein located.

Perjury—Making False Oath.

Section 4. Any person who shall make any false oath to any report required by the provisions of this Act shall be deemed guilty of perjury.

Oklahoma Tax Commission—Examine Books and Records.

Section 5. If any person, firm, association, or corporation shall fail to make the report of the production and purchase, or production without sale, as the case may be, of petroleum oil, or the computation of the excise tax hereby levied, within the time prescribed by law for such report, it shall be the duty of the Oklahoma Tax Commission to examine the books, records, and files of such person, firm, association, or corporation to ascertain the amount of oil produced and/or sold, and to compute the taxes thereon, as provided herein, to which shall be added the costs of such examination, together with any and all penalties accrued thereon; and any person, firm, association or corporation who shall fail to file any sworn statement or report required by the provisions of this Act, in the manner and in the time prescribed, shall be liable to a penalty of five hundred dollars for each day such person, firm, association or corporation shall fail or refuse to file such statement or report or comply with the provisions hereof, which shall be a lien upon all the property and assets of such person, firm, association, or corporation located in this State, and may be recovered at a suit of the State in any court of competent jurisdiction.

Effect of Unconstitutionality of Any Section.

Section 6. If any section, paragraph, sentence, or phrase of this Act shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such act shall not in any way affect the remaining sections, paragraphs,

sentences, or phrases of this Act, but the same shall continue in full force and effect.

Approved April 10, 1933. Emergency.

Chapter 66, Article 5, Oklahoma Session Laws 1931.

Tax—Paid on Monthly Basis—Oklahoma Tax Commission.

Section 1. The gross production tax on petroleum oil, natural gas or casinghead gas, as provided by law, shall, after June 30, 1931, be paid on a monthly basis in accordance with this Act.

Said tax shall become due on the first day of each calendar month on all petroleum oil, natural gas or casinghead gas produced and saved during the preceding monthly period, and if the tax is not paid on or before the end of said month the same becomes due the tax shall become delinquent and shall be collected in the manner provided by law for the collection of delinquent gross production taxes.

On oil, gas or casinghead gas sold at the time of production the gross production tax thereon shall be paid by the purchaser of such products and such purchaser shall, and is hereby authorized to deduct in making settlements with the producer and/or royalty owner the amount of tax so paid; provided, that in the event oil on which such gross production tax becomes due is not sold at the time of production but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself including the tax due on royalty oil not sold; provided, further, that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of the tax paid.

Casinghead gas when utilized in the manufacture of casinghead gasoline by the producer shall be considered for the purpose of this Act as to the amount utilized as casinghead gas actually sold.

In case oil, gas or casinghead gas is sold under circumstances where the sale price does not represent the cash price

thereof prevailing for oil, gas or casinghead gas of like kind, character or quality in the field from which such product is produced, the Oklahoma Tax Commission may require the said tax to be paid upon the basis of the prevailing price then being paid at the time of production thereof in said field for oil, gas or casinghead gas of like kind, quality and character.

Section 12434, Oklahoma Statutes 1931.

12434. *Quarter Annual Reports—Oil, Gas, Mineral Production—Taxes—Regulation:*

Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty in-

terest within the time and in the manner provided by this Act.

The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records, and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the district court of this State having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil, or for natural gas upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of in and around any such well or mine, the value of the oil, gas asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be

its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered.

Section 12445.

Oklahoma Statutes 1931.

12445. *Distribution and Uses of Taxes.*

The gross production tax provided for in this Act is hereby levied and collected for the following specific purposes, to-wit:

(1) For current expenses of State Government: Two-thirds.

(2) For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth, (five mills).

(3) For and in aid of the construction of permanent roads and bridges of the county from whence the oil and gas and other mineral is produced, one-sixth (five mills).

It shall be the duty of the State Auditor to pay two-thirds of all gross production taxes levied and collected under the provisions of this Act to the State Treasurer to be credited to the general revenue fund of the State, and applied to the current expenses of State Government; and to pay one-third the sum collected from each county whence the oil or gas or asphalt or of ores bearing lead, zinc, jack, gold, silver or copper was produced to the county treasurer of such county; one-half the amount so paid to the county treasurer to be credited to the common school fund of the county in proportion to the school population of such county; the remaining one-half so paid to the county treas-

urer to be credited to a fund of such county known as the road and bridge fund, provided, that should the rate of tax herein levied be raised or lowered by the State Board of Equalization, as authorized in Section 1 of this Act, (12434) such increase or decrease shall be added to, or deducted from, that portion of the tax which is levied for the current expenses of state government.